

**Round Rock Lime Company and International Union of Operating Engineers, Local 819, AFL-CIO, Case 16-CA-10141**

February 25, 1982

BY MEMBERS FANNING, JENKINS, AND  
ZIMMERMAN

**DECISION AND ORDER**

Upon a charge filed on October 23, 1981, by International Union of Operating Engineers, Local 819, AFL-CIO, herein called the Union, and duly served on Round Rock Lime Company, herein called Respondent, the General Counsel of the National Labor Relations Board, by the Regional Director for Region 16, issued a complaint on November 10, 1981, against Respondent, alleging that Respondent had engaged in and was engaging in unfair labor practices affecting commerce within the meaning of Section 8(a)(5) and (1) and Section 2(6) and (7) of the National Labor Relations Act, as amended. Copies of the charge and complaint and notice of hearing before an administrative law judge were duly served on the parties to this proceeding.

With respect to the unfair labor practices, the complaint alleges in substance that on September 11, 1981, following a Board election in Case 16-RC-8266, the Union was duly certified as the exclusive collective-bargaining representative of Respondent's employees in the unit found appropriate;<sup>1</sup> and that, commencing on or about October 15, 1981, and at all times thereafter, Respondent has refused, and continues to date to refuse, to bargain collectively with the Union as the exclusive bargaining representative, although the Union has requested and is requesting it to do so. On November 20, 1981, Respondent filed its answer to the complaint admitting in part, and denying in part, the allegations in the complaint.

On December 10, 1981, counsel for the General Counsel filed directly with the Board a Motion for Summary Judgment. Subsequently, on December 15, 1981, the Board issued an order transferring the proceeding to the Board and a Notice To Show Cause why the General Counsel's Motion for Summary Judgment should not be granted. Respondent thereafter filed a response to the Notice To Show Cause.

<sup>1</sup> Official notice is taken of the record in the representation proceeding, Case 16-RC-8266, as the term "record" is defined in Secs. 102.68 and 102.69(g) of the Board's Rules and Regulations, Series 8, as amended. See *LTV ElectroSystems, Inc.*, 166 NLRB 938 (1967), *enfd.* 388 F.2d 683 (4th Cir. 1968); *Golden Age Beverage Co.*, 167 NLRB 151 (1967), *enfd.* 415 F.2d 26 (5th Cir. 1969); *Intertype Co. v. Penello*, 269 F.Supp. 573 (D.C.Va. 1967); *Follett Corp.*, 164 NLRB 378 (1967), *enfd.* 397 F.2d 91 (7th Cir. 1968); Sec. 9(d) of the NLRA, as amended.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

Upon the entire record in this proceeding, the Board makes the following:

**Ruling on the Motion for Summary Judgment**

In its answer to the complaint and its response to the Notice To Show Cause, Respondent attacks the validity of the Union's certification because of the alleged erroneous resolution of its objections to the election in Case 16-RC-8266.

Review of the record herein, as well as that of Case 16-RC-8266, reveals that on March 6, 1981, an election was conducted pursuant to a Stipulation for Certification Upon Consent Election. The tally of ballots showed that 38 votes were cast for, and 37 votes were cast against, the Union. There was one challenged ballot which was sufficient to affect the results of the election. Respondent timely filed objections to conduct affecting the results of the election, alleging that, the Union and its agents threatened employees with physical violence, financial harm, and deportation, and made material misrepresentations which warranted setting aside the election. After an investigation, the Regional Director issued a Report on Objections and Challenged Ballot in which he sustained the challenge to the one outstanding ballot, overruled Respondent's objections, and recommended that the Union be certified. In overruling Respondent's objections, the Regional Director found, *inter alia*, that the evidence of objectionable threats presented by Respondent could not be attributed to the Union. The Regional Director also found that the Union had made no material misrepresentations but that, even if it had, the Employer had time to rebut those statements.

Thereafter, Respondent timely filed exceptions to the Report on Objections and Challenged Ballot, alleging that the Regional Director erred in determining that the Union had not engaged in threats and material misrepresentations and contending that the Regional Director's failure to order a hearing on its objections constituted a denial of due process. On September 11, 1981, the Board issued a Decision and Certification of Representative in which it adopted the findings and recommendations of the Regional Director.<sup>2</sup>

<sup>2</sup> The Board disavowed the Regional Director's reliance on the subjective effect on the employees' state of mind in finding that the alleged objectionable conduct did not interfere with the employees' free choice in the election. The Board further noted that the Employer's exceptions did not raise material or substantial issues of fact which would warrant either a reversal of the Regional Director's findings and recommendations, or a

*Continued*

As reflected in its answer to the complaint, and its response to the Notice To Show Cause, Respondent's defense to the alleged violations of Section 8(a)(5) and (1) is that the Board erroneously overruled its objections to conduct affecting the results of the election or, in the alternative, erroneously failed to order a hearing thereon. However, these matters were raised and fully considered by the Board in the underlying representation proceeding and were resolved adversely to Respondent.

It is well settled that in the absence of newly discovered or previously unavailable evidence or special circumstances a respondent in a proceeding alleging a violation of Section 8(a)(5) is not entitled to relitigate issues which were or could have been litigated in a prior representation proceeding.<sup>3</sup>

All issues raised by Respondent in this proceeding were or could have been litigated in the prior representation proceeding, and Respondent does not offer to adduce at a hearing any newly discovered or previously unavailable evidence, nor does it allege that any special circumstances exist herein which would require the Board to reexamine the decision made in the representation proceeding. We therefore find that Respondent has not raised any issue which is properly litigable in this unfair labor practice proceeding. Accordingly, we grant the Motion for Summary Judgment.

On the basis of the entire record, the Board makes the following:

#### FINDINGS OF FACT

##### I. THE BUSINESS OF RESPONDENT

Respondent, a Texas corporation with its principal place of business in Blum, Texas, is engaged in the operation of a lime processing plant. During the past 12-month period, Respondent, in the course and conduct of its business operations at its Blum, Texas, facility, has shipped and sold goods valued in excess of \$50,000 to customers within the State of Texas who, in turn, have shipped and sold goods or services valued in excess of \$50,000 directly to customers located outside the State of Texas.

We find, on the basis of the foregoing, that Respondent is, and has been at all times material herein, an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act, and that it will effectuate the policies of the Act to assert jurisdiction herein.

hearing. (Decision and Certification of Representative not included in volumes of Board Decisions.)

<sup>3</sup> See *Pittsburgh Plate Glass Co. v. N.L.R.B.*, 313 U.S. 146, 162 (1941); Rules and Regulations of the Board, Secs. 102.67(f) and 102.69(c).

##### II. THE LABOR ORGANIZATION INVOLVED

International Union of Operating Engineers, Local 819, AFL-CIO, is a labor organization within the meaning of Section 2(5) of the Act.

##### III. THE UNFAIR LABOR PRACTICES

###### A. *The Representation Proceeding*

###### 1. The unit

The following employees of Respondent constitute a unit appropriate for collective-bargaining purposes within the meaning of Section 9(b) of the Act:

All full-time production and maintenance employees including laboratory employees employed by the Employer at its Blum, Texas facility, excluding all clerical, office and professional employees, guards, watchmen and supervisors as defined in the Act.

###### 2. The certification

On March 6, 1981, a majority of the employees of Respondent in said unit, in a secret-ballot election conducted under the supervision of the Regional Director for Region 16, designated the Union as their representative for the purpose of collective bargaining with Respondent.

The Union was certified as the collective-bargaining representative of the employees in said unit on September 11, 1981, and the Union continues to be such exclusive representative within the meaning of Section 9(a) of the Act.

###### B. *The Request To Bargain and Respondent's Refusal*

Commencing on or about May 5, 1981, and at all times thereafter, the Union has requested Respondent to bargain collectively with it as the exclusive collective-bargaining representative of all the employees in the above-described unit. Commencing on or about October 15, 1981, and continuing at all times thereafter to date, Respondent has refused, and continues to refuse, to recognize and bargain with the Union as the exclusive representative for collective bargaining of all employees in said unit.

Accordingly, we find that Respondent has, since October 15, 1981, and at all times thereafter, refused to bargain collectively with the Union as the exclusive representative of the employees in the appropriate unit, and that, by such refusal, Respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(5) and (1) of the Act.

#### IV. THE EFFECT OF THE UNFAIR LABOR PRACTICES UPON COMMERCE

The activities of Respondent set forth in section III, above, occurring in connection with its operations described in section I, above, have a close, intimate, and substantial relationship to trade, traffic, and commerce among the several States and tend to lead to labor disputes burdening and obstructing commerce and the free flow of commerce.

#### V. THE REMEDY

Having found that Respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(5) and (1) of the Act, we shall order that it cease and desist therefrom, and, upon request, bargain collectively with the Union as the exclusive representative of all employees in the appropriate unit and, if an understanding is reached, embody such understanding in a signed agreement.

In order to insure that the employees in the appropriate unit will be accorded the services of their selected bargaining agent for the period provided by law, we shall construe the initial period of certification as beginning on the date Respondent commences to bargain in good faith with the Union as the recognized bargaining representative in the appropriate unit. See *Mar-Jac Poultry Company, Inc.*, 136 NLRB 785 (1962); *Commerce Company d/b/a Lamar Hotel*, 140 NLRB 226, 229 (1962), enfd. 328 F.2d 600 (5th Cir. 1964), cert. denied 379 U.S. 817; *Burnett Construction Company*, 149 NLRB 1419, 1421 (1964), enfd. 350 F.2d 57 (10th Cir. 1965).

The Board, upon the basis of the foregoing facts and the entire record, makes the following:

#### CONCLUSIONS OF LAW

1. Round Rock Lime Company is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. International Union of Operating Engineers, Local 819, AFL-CIO, is a labor organization within the meaning of Section 2(5) of the Act.

3. All full-time production and maintenance employees including laboratory employees employed by the Employer at its Blum, Texas facility, excluding all clerical, office and professional employees, guards, watchmen and supervisors as defined in the Act, constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act.

4. Since September 11, 1981, the above-named labor organization has been and now is the certified and exclusive representative of all employees in the aforesaid appropriate unit for the purpose of collec-

tive bargaining within the meaning of Section 9(a) of the Act.

5. By refusing on or about October 15, 1981, and at all times thereafter, to bargain collectively with the above-named labor organization as the exclusive bargaining representative of all the employees of Respondent in the appropriate unit, Respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(5) of the Act.

6. By the aforesaid refusal to bargain, Respondent has interfered with, restrained, and coerced, and is interfering with, restraining, and coercing, employees in the exercise of the rights guaranteed them in Section 7 of the Act, and thereby has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(1) of the Act.

7. The aforesaid unfair labor practices are unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

#### ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board hereby orders that the Respondent, Round Rock Lime Company, Blum, Texas, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Refusing to bargain collectively concerning rates of pay, wages, hours, and other terms and conditions of employment with International Union of Operating Engineers, Local 819, AFL-CIO, as the exclusive bargaining representative of its employees in the following appropriate unit:

All full-time production and maintenance employees including laboratory employees employed by the Employer at its Blum, Texas facility, excluding all clerical, office and professional employees, guards, watchmen and supervisors as defined in the Act.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them in Section 7 of the Act.

2. Take the following affirmative action which the Board finds will effectuate the policies of the Act:

(a) Upon request, bargain with the above-named labor organization as the exclusive representative of all employees in the aforesaid appropriate unit with respect to rates of pay, wages, hours, and other terms and conditions of employment and, if an understanding is reached, embody such understanding in a signed agreement.

(b) Post at its Blum, Texas, facility copies of the attached notice marked "Appendix."<sup>4</sup> Copies of said notice, on forms provided by the Regional Director for Region 16, after being duly signed by Respondent's representative, shall be posted by Respondent immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to insure that said notices are not altered, defaced, or covered by any other material.

(c) Notify the Regional Director for Region 16, in writing, within 20 days from the date of this Order, what steps have been taken to comply herewith.

<sup>4</sup> In the event that this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

#### APPENDIX

NOTICE TO EMPLOYEES  
POSTED BY ORDER OF THE  
NATIONAL LABOR RELATIONS BOARD  
An Agency of the United States Government

WE WILL NOT refuse to bargain collectively concerning rates of pay, wages, hours, and

other terms and conditions of employment with International Union of Operating Engineers, Local 819, AFL-CIO, as the exclusive representative of the employees in the bargaining unit described below.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce our employees in the exercise of the rights guaranteed them by Section 7 of the Act.

WE WILL, upon request, bargain with the above-named Union, as the exclusive representative of all employees in the bargaining unit described below, with respect to rates of pay, wages, hours, and other terms and conditions of employment and, if an understanding is reached, embody such understanding in a signed agreement. The bargaining unit is:

All full-time production and maintenance employees including laboratory employees employed by the Employer at its Blum, Texas facility, excluding all clerical, office and professional employees, guards, watchmen and supervisors as defined in the Act.

ROUND ROCK LIME COMPANY